In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE APPELLANTS COX BROADCASTING CORPORATION AND THOMAS WASSELL

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OPENING STATEMENT

Appellants Cox Broadcasting Corporation and Thomas Wassell appeal the judgment of the Supreme Court of Georgia which upholds the constitutionality of GA. CODE ANN. § 26-9901, a criminal statute prohibiting the news media's publication of the name of a female victim of rape or attempted rape. In the course of a timely news story concerning the disposition in open court of the criminal charges, the appellants published the name of an alleged victim of a murder-rape as it appeared in the indictments.

The publication occurred in a news story filmed on the courthouse steps and broadcast on the day of the hearing (eight months after the criminal incident and the death of the victim).

The Georgia Court has held that because of GA. CODE ANN. § 26-9901, the First Amendment to the Constitution of the United States fails to protect or to privilege the appellants' publication of a rape victim's name. The Georgia Court has further concluded that the appellants may constitutionally be held liable for civil damages for allegedly invading the right to privacy of the deceased victim's father by their publication of the victim's name.

OPINIONS BELOW

The decision and the opinion on rehearing of the Supreme Court of Georgia are reported at 231 Ga. 60, 200 S.E.2d 127 (1973) and are set forth in Appendix A to the appellants' Jurisdictional Statement, A-9 through A-26. The opinion of the Superior Court of Fulton County in this cause is not reported, but is set forth in Appendix A to the appellants' Jurisdictional Statement, A-1 through A-6.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), for this appeal draws into question the validity of 1968 GA. LAWS, pp. 1335, 1336 (GA. CODE ANN. § 26-9901) on grounds that it is repugnant to the Constitution of the United States.

Appellants seek to review the judgment of the Supreme Court of Georgia in a civil action for invasion of privacy. The court below ruled that Cox Broadcasting Corporation and its reporter Thomas Wassell may be held liable for civil damages if a jury finds their publication

of the name of a deceased victim of a murder-rape in the course of a truthful news story concerning the public trial of those accused of the crime to be "highly offensive."[1] The news story complained of was broadcast on the day of the trial.

The Georgia Supreme Court expressly held that the Georgia criminal statute (GA. CODE ANN. § 26-9901) prohibiting under all circumstances the disclosure of the name of a victim of a rape or an attempted rape does not violate the First Amendment to the Constitution of the United States.[2] The Court further held that because of this statute, the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in the State of Georgia.[3] The Court concluded that the First Amendment does not bar the plaintiff's claim[4] and remanded the case to the trial court with instructions to submit the case to the jury to determine if "reasonable men would find the invasion highly offensive."[5]

Thus, the Supreme Court of Georgia has rendered a final judgment that the First and Fourteenth Amendments to the Constitution of the United States do not protect the appellants' actions in broadcasting the truthful news re-

1. "And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." Appendix to Jurisdictional Statement, A-17.

2. "We hold that this 1968 Georgia statute is not unconstitutional." Appendix to Jurisdictional Statement, A-26.

3. ". . . and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state." Appendix to Jurisdictional Statement, A-26.

4. "First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case." Appendix to Jurisdictional Statement, A-21.

5. See Appendix to Jurisdictional Statement, A-17.

port of which the plaintiff complains. The Supreme Court of Georgia has also rendered a final judgment that GA. CODE ANN. § 26-9901 does not abridge the freedom of the press guaranteed to the appellants by the First and Fourteenth Amendments to the Constitution of the United States.[6]

Although remanding this case to the Georgia trial court for further proceedings, the decision of the Supreme Court of Georgia constitutes a final judgment on controlling issues of federal constitutional law. The judgment of the Supreme Court of Georgia is binding upon the trial court and not subject to further review in Georgia.

The decision of the Georgia Court seriously erodes the protection which the First Amendment affords newscasters to publish truthful accounts of matters of public interest.[7] The federal claims presented for review here are separate from the issues still to be determined in a state court trial, i.e., whether defendants' actions invaded plaintiff's right of privacy, and if so, to what extent. Determination of defendants' First Amendment claim may avoid a long and costly trial and subsequent appeals. Finally, defendants' claim does present a question which is fundamental to the case and yet is independent of what will be in issue at any subsequent state court trial.

The Supreme Court of Georgia rendered its decision on September 5, 1973 (A. 56). On September 19, 1973 the Supreme Court of Georgia denied a petition for rehearing

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6. Although the Georgia Court speaks generally in terms of the First Amendment, the Court acknowledged: "The protections to speech and press contained in the First Amendment to the Constitution of the United States are made applicable to the State of Georgia by the Fourteenth Amendment." Appendix to Jurisdictional Statement, A-18.

7. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

(Appendix to Jurisdictional Statement, A-24). Timely notice of appeal to this Court was filed in the Supreme Court of Georgia and the Superior Court of Fulton County, Georgia on December 6, 1973 (Appendix to Jurisdictional Statement, A-27, 29). On December 17, 1973 appellants filed their Jurisdictional Statement in this Court.

On February 19, 1974 this Court entered an order as follows:

> "In this case jurisdiction is postponed to the hearing of the case on the merits." ..... U.S. .....

In the alternative, should this Honorable Court not consider the decision of the Supreme Court of Georgia reviewable by means of an appeal under 28 U.S.C. § 1257 (2), the appellants respectfully request that pursuant to 28 U.S.C. § 2103, the papers whereupon this appeal is taken be regarded and acted upon as a Petition for a Writ of Certiorari within the Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

The Constitutional provisions which appellants contend the judgment of the Supreme Court of Georgia violates are the following clauses of the First Amendment to the CONSTITUTION OF THE UNITED STATES, to wit:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press"

and the following clause of the Fourteenth Amendment to the Constitution of the United States, to wit:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

This case also involves 1968 GA. LAWS, pp. 1335, 1336 (GA. CODE ANN. § 26-9901) which provides:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

QUESTIONS PRESENTED

1.

Whether the Court has jurisdiction to hear this appeal.

2.

Whether GA. CODE ANN. § 26-9901, as construed and applied by the Supreme Court of Georgia, abridges the freedom of speech and press and denies due process of law and is overly broad on its face and in its application in violation of the First and Fourteenth Amendments to the United States Constitution.

3.

Whether, consistent with the requirements of the First and Fourteenth Amendments to the Constitution of the United States, the Georgia General Assembly has the

power to regulate the contents of publications by the news media by legislatively declaring what information and facts are of public interest.

4.

Whether the Supreme Court of Georgia erred in holding that the First and Fourteenth Amendments to the United States Constitution do not bar this action for damages against appellants (a news media and its reporter) for the truthful publication of a matter of public interest and a matter of public record—i.e., the name of the deceased victim of a murder-rape, in the course of a timely news story concerning the trial of those accused of the crime.

5.

Whether the Georgia Court erred in holding that appellants may be liable for publishing the victim's name in the course of a news report of the trial of those accused of murder and rape because the constitutional protections afforded the truthful publications of matters of public interest include the privilege to discuss or publish any fact rationally related or relevant to the subject matter of public interest.

STATEMENT OF THE CASE

Cynthia Leslie Cohn died on August 18, 1971 under circumstances which led to a Fulton County Grand Jury's indictment of six young men on March 3, 1972 for her murder and rape (A. 19). Each of the indictments handed down by the Grand Jury became part of the public records of the court, and each named Cynthia Cohn as the victim (A. 23, 25).

On April 10, 1972 appellant Wassell, acting in his capacity as a news reporter for WSB-TV, attended the trial of the six indicted defendants at the Fulton County Courthouse (A. 16). During these proceedings, held in open court, the State moved to dismiss the murder indictments against all defendants. Thereafter, five of the six defendants entered guilty pleas to the remaining rape indictment. The sixth defendant first pleaded guilty, but during the proceedings thereafter withdrew his plea of guilty and demanded a jury trial (A. 20, 21).

The Court was advised by the District Attorney that "the girl's family felt that a lenient five-year sentence would serve justice" (A. 20). The Court then imposed sentence upon the five defendants who had pleaded guilty (A. 20, 21).

Following the proceedings in open court, appellant Wassell prepared a news report which was subsequently filmed on the steps of the Fulton County Courthouse (A. 13). This news report was based on information obtained at the trial and from the indictments on record with the Clerk of the Superior Court of Fulton County (A. 17, 18).

The filmed news report related exclusively to the proceedings which had transpired in Court that day and to the subsequent transfer of four of the six defendants from the Fulton County Courthouse to Fulton County Jail (A. 17).

In the course of this filmed news report, appellant Wassell identified the crimes of murder and rape, with which these defendants were charged, by reference to the name of the deceased victim, Cynthia Cohn (A. 18). The opening lines of the filmed report contained the sole reference to the victim's name:

"Six youths went on trial today for the murder-rape of a teenaged girl.

"The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18.

"The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.

"There was no jury. The six boys, through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie. . . .

"Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family felt that a lenient 5 year sentence would serve justice and he recommended a five year sentence" (A. 19, 20).

The filmed news report related the names of the six defendants and the fact that the murder charges had been dropped against all of the defendants (A. 20). The news report also indicated that five of the defendants pleaded guilty to the charges of rape and that one defendant pleaded guilty and then withdrew his plea (A. 20, 21). The recommendations of the plaintiff concerning sentences as well as the sentences imposed on each defendant were also reported (A. 20, 21).

WSB-TV thereafter televised the filmed news report during the course of its regularly scheduled news program

at 6:00 p.m. on April 10, 1972 and again during the early morning hours of April 11, 1972 (A. 6).

On May 8 ,1972 Martin Cohn filed his Complaint against Cox Broadcasting Corporation, the owner and licensee of WSB-TV, and reporter Thomas Wassell, alleging that the defendants had televised or caused to be televised willfully, unlawfully, negligently, and in violation of the GA. CODE ANN. § 26-9901 the name of the plaintiff's deceased daughter, Cynthia Leslie Cohn. The Complaint alleged that the broadcast resulted in the invasion of the plaintiff's right of privacy (A. 4). The Complaint further demanded a judgment against defendants for $1,000,000 (A. 4).

The defendants answered the Complaint on June 7, 1972 and asserted, *inter alia*,[8] that their actions were privileged under the First and Fourteenth Amendments to the Constitution of the United States (A. 9). On October 24, 1972 the defendants timely amended their answer to add the affirmative defense that GA. CODE ANN. § 26-9901, to the extent the statute applied to the actions of the defendants, was an unconstitutional abridgement of freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States (A. 42).

There being no dispute as to any material fact, the plaintiff and the defendants thereafter filed cross Motions

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8. It is interesting to note that appellants also raised the issue that the statute was totally inapplicable to the instant action in that it applied only to the situation where the rape victim in question is living at the time of the publication. As stated heretofore, the said rape victim in this action died approximately *eight (8) months* prior to the publication of appellants—the publication being at the time of the trial of accused defendants and not at the time of the murder-rape incident.

The Georgia Supreme Court avoided ruling on this contention by holding initially that the said Georgia statute (GA. CODE ANN. § 26-9901) did not support a civil cause of action.

for Summary Judgment with accompanying affidavits[9] (A. 11, 16, 26).

On December 13, 1972 the Superior Court of Fulton County entered an order and written opinion[10] granting the plaintiff's Motion for Summary Judgment on the issue of liability and denying the defendants' Motion for Summary Judgment. The trial court held that GA. CODE ANN. § 26-9901 states a rule of civil conduct which the defendants had violated and for which they were liable in damages (Appendix to Jurisdictional Statement, A-4, 5). The Court expressly considered the restrictions on speech and press presented by the statute, but held that the restrictions were not unreasonable.[11]

On December 22, 1972 the defendants filed a Motion to Reconsider in the trial court (A. 47). In this Motion the defendants again raised the federal constitutional issues for the Court's consideration (A. 48, R. 317).

On December 29, 1972 after hearing oral arguments, the Superior Court reaffirmed and adhered to its Order and Opinion of December 13, 1972 (A. 49). The Court certified that the Order should be subject to review by direct appeal in the Georgia Supreme Court (A. 50).

On January 9, 1973 the defendants filed an appeal in the Supreme Court of Georgia to review the trial court's Orders of December 13 and December 29, 1973, granting the plaintiff's Motion for Summary Judgment on the issue

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9. The defendants objected to and moved to strike the conclusions and self-serving hearsay contained in the plaintiff's affidavits (A. 27). However, the trial court found it unnecessary to rule on the defendants' objections because the Court relied only upon that portion of plaintiff's affidavits which established that he was the father (Appendix to Jurisdictional Statement, A-2).

10. Appendix to Jurisdictional Statement, A-1— A-6.

11. Appendix to Jurisdictional Statement, A-4.

of liability and denying the defendants' Motion for Summary Judgment (A. 50).

Before the Supreme Court of Georgia the defendants again asserted, *inter alia*, that their actions were privileged under the First and Fourteenth Amendments to the Constitution of the United States [Appellants' Assignments of Error Nos. 4, 10] (A. 53), and that GA. CODE ANN. § 26-9901, to the extent that the statute applied to their actions, violated the First and Fourteenth Amendments to the Constitution of the United States [Appellants' Assignments of Error Nos. 12, 13] (A. 55).

On September 5, 1973 the Supreme Court of Georgia, in a divided opinion (4-3), affirmed the judgment of the trial court in part, reversed in part, and remanded with direction (A. 56). The Court held that GA. CODE ANN. § 26-9901 does not give rise to a civil cause of action and thus the Court unanimously reversed the entry of summary judgment for the plaintiff on the issue of liability.[12]

However, a majority (4-3) of the Supreme Court of Georgia affirmed the denial of the defendants' Motion for Summary Judgment (A. 56). The Court expressly considered the "head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press." The majority (4-3) of the Court concluded:

> "First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case." (Appendix to Jurisdictional Statement, A-21).

The majority held that the defendants would be liable for money damages if a jury finds that the defendants invaded the plaintiff's privacy by publishing the name of the victim "with wilful or negligent disregard for the

12. Appendix to Jurisdictional Statement, A-12, A-13.

fact that reasonable men would find the invasion highly offensive."[13]

The three dissenting Justices of the Georgia Supreme Court concluded that the actions of the defendant were privileged under the First Amendment as a publication of information regarding a matter of public interest (Appendix to Jurisdictional Statement, A-22).

The appellants moved for rehearing in the Supreme Court of Georgia and once again asserted their claims of privilege under the First and Fourteenth Amendments to the Constitution of the United States (A. 56).

On September 19, 1973 the Supreme Court of Georgia denied the appellants' Motion for Rehearing and expressly ruled that the 1968 Georgia criminal statute (GA. CODE ANN. § 26-9901) was constitutional. The Court held that because of this statute, the disclosure of the identity of the victim of a rape or an attempted rape is not a matter of public interest and general concern in the State of Georgia. Thus, the Court concluded that such a disclosure was not within the protection of the First Amendment:

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment.
>
> "There simply is no public interest or general concern about the identity of the victim of such a

13. Appendix to Jurisdictional Statement, A-17.

crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.

. . .

"We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state." (Appendix to Jurisdictional Statement, A-24—A-26).

ARGUMENT

I.

INTRODUCTION AND SUMMARY

The defendants' news report, which is the subject of this action, concerns public court proceedings wherein the State sought to dismiss indictments for murder; where guilty pleas to charges of rape were entered and subsequently withdrawn; and where the court imposed sentences on those accused of a particular notorious crime (A. 6 and A. 19-22). This report was the essence of truthful and accurate comment on the actions of public officials and the report constituted timely news coverage of an event of widespread public interest (A. 6).

The plaintiff's suit is predicated on the defendants' alleged violation of GA. CODE ANN. § 26-9901 by publishing the name of the victim in the course of the news story. The defendants have steadfastly maintained that the admitted publication was privileged under the First and Fourteenth Amendments and that if GA. CODE ANN. § 26-9901 applied to their actions, the statute is an unconstitutional abridgment of the freedom of the press.

These constitutional questions were raised and ruled upon in the trial court and in the Supreme Court of Georgia. The trial court held the statute valid, the publication unprotected by the constitutional guarantees of free speech and press, and the defendants liable as a matter of law.[14]

The Supreme Court affirmed the trial court's rulings on the constitutional questions, but remanded for a jury to determine whether the publication actually invaded the plaintiff's privacy and whether the invasion was "with

14. Appendix to Jurisdictional Statement, A-4, 5.

wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive."[15] Thus, the Georgia Supreme Court has conclusively determined the constitutional issues presented by this case. The decision below is "final" for the purposes of 28 U.S.C. § 1257 (2).

The decisions of the Supreme Court of Georgia strip the defendants of their constitutional privilege to publish matters of public interest and vest the legislature with the constitutionally forbidden[16] authority to regulate the news media's publication of matters of public interest and facts of public record according to the legislature's judgment of the publication's "social value." The enormity of the constitutional errors of the Georgia courts and the grave implications and consequences to First Amendment freedoms which such decisions may foster compel the appeal to this Honorable Court.

The errors and deficiencies of the decision of the Georgia Supreme Court here on appeal are not difficult to detect and indeed are lucidly obvious to the reader cognizant of current constitutional principles and decisions in the First Amendment area, to wit:

1. In upholding the constitutionality of GA. CODE ANN. § 26-9901, the Georgia Supreme Court has totally failed to apply and to adhere to the constitutional principle expressed in this Court's opinions that the State's power to regulate speech and press is extraordinarily narrow and exists, if at all, only upon a showing of grave and immediate danger to interests

15. Appendix to Jurisdictional Statement, A-17, 21, 26.

16. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

which the State may lawfully protect. See *Herndon* v. *Lowry*, 301 U.S. 242 (1937).

No "compelling" state interest has been shown which would justify the limitations which the Georgia statute imposes on the constitutional privilege to truthfully discuss and publish matters of public interest.[17]

By its terms GA. CODE ANN. § 26-9901 applies only to the media of public dissemination, and the unmistakable purpose of this legislation, as evidenced by its recent amendment,[18] is to regulate the content of the news media.

The subject matter of this statutory prohibition, the name or identity of a rape victim, is clearly related to the public's serious and legitimate interest in learning of the violations and enforcement of criminal law. In many instances, as here, the name of the victim can itself be a matter of public interest. Publication of the name or identity of a rape victim can serve the public interest: in the tragedies which befall victims of crimes; in seeing that victims of crimes receive proper care and support; in facilitating the prosecution of criminal violations by identifying and securing possible prosecution and defense witnesses; and in assuring that the criminal processes in a particular case are proceeding without either subterfuge

17. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), 372 U.S. 909 (1963); *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962); *Waters* v. *Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); *Jenkins* v. *Dell Publishing Company, Inc.*, 251 F.2d 447 (3rd Cir. 1958).

18. The Georgia statute was first passed in 1911. 1911 GA. LAWS, p. 179, GEORGIA CRIMINAL CODE ANN. § 343 (1914). The statute was recodified as GA. CODE ANN. § 26-2105 (1953). In 1968 the present version of the statute was enacted expanding the prohibitions to include the broadcast media.

or harassment. Publication of the name of the victim of such a crime is certainly well within the broad definition of "public interest" which has emerged in those cases dealing with the issue.[19]

The statute, therefore, blatantly pierces the sphere of constitutional freedoms and accordingly is unconstitutional.[20]

2. In rejecting appellants' contention that GA. CODE ANN. § 26-9901 is unconstitutionally overbroad, the Georgia Court has ignored the limitations which this Court has applied to statutes which regulate First Amendment activities. *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479 (1960); *NAACP* v. *Alabama,* 377 U.S. 288 (1964). This Court has repeatedly stated "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. at 488 (1960). The Georgia Supreme Court has totally failed to apply the over-

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19. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971); *Kois* v. *Wisconsin,* 408 U.S. 229 (1972); *Time, Inc.* v. *Johnston,* 448 F.2d 378 (4th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858 (5th Cir. 1970); *Cantrell* v. *Forest City Publishing Company,* ..... F.2d ..... (6th Cir. 1973); *Jenkins* v. *Dell Publishing Company, Inc.,* 251 F.2d 447 (3rd Cir. 1958); *Waters* v. *Fleetwood,* 212 Ga. 161, 91 S.E.2d 344 (1956).

20. This sphere of constitutionally protected speech, as defined by the rulings of this Court, includes comments regarding public officials, public figures, and matters of public interest. *New York Times* v. *Sullivan,* 376 U.S. 254 (1967); *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971). As we discuss hereinafter in the brief, numerous circumstances may be envisioned when the name or identity of a rape victim would involve a public official or public figure or would be a matter of legitimate public interest. See p. 39 of this Brief, *infra.*

breadth doctrine[21] and has constitutionally approved a statute which broadly and imprecisely proscribes action and conduct that are clearly protected by the First Amendment.[22]

3. The decision of the Supreme Court of Georgia upholding the constitutionality of GA. CODE ANN. § 26-9901 confers upon the General Assembly the power to regulate by fiat the news media's truthful publication of matters of public record in accordance with the General Assembly's view of what are "mat-

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21. However, the overbreadth doctrine is not unknown to the Georgia Supreme Court and has been applied on numerous occasions. *Sanders* v. *Georgia*, 231 Ga. 608, 203 S.E.2d 153 (1974); *City of Atlanta* v. *Twentieth Century-Fox Film Corp.*, 219 Ga. 271 (1963); *K. Gordon Murray Productions, Inc.* v. *Floyd*, 217 Ga. 784 (1962). In *Sanders* v. *Georgia*, *supra*, the Georgia Supreme Court recently noted:

> *"However, the overly broad coverage contemplated by this statute and ordinance creates a chilling effect upon the exercise of free expression.* We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. To apply this statute and ordinance literally to the appellant's book store creates an in terrorem effect on the exercise of freedoms guaranteed and cherished under both State and Federal Constitutions. *We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity.* If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose.
>
> We hold, therefore, that both Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Ch. 10, Art. VI) *are unconstitutional on their face for overbreadth, through the imposition of criminal and civil sanctions for the exercise of otherwise protected speech and expression"* (emphasis added). 231 Ga. at 614, 203 S.E.2d at 157.

22. For example, this statute prohibits the publication of the name or identity of a rape victim irrespective of truth or falsity, reasonableness, newsworthiness of the event or the person, timeliness, or public interest. Such a broad and indiscriminate statutory prohibition certainly is not in harmony with this Court's overbreadth decisions. *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Stanley* v. *Georgia*, 394 U.S. 557 (1969). See additional decisions cited at pages 41, 42 of this brief, *infra*.

ters of public interest and general concern" within the State of Georgia (Appendix to Jurisdictional Statement, A-26). Under the decision of the Supreme Court of Georgia, the Georgia General Assembly may decide what matters are of public interest and limit the news media's publication to those facts. The majority of the Supreme Court of Georgia adopts this novel position without discussion or even citation of a single decision of the Supreme Court of the United States. Such a position is directly contrary to the entire constitutional principle underlying the First Amendment.

By its terms the First Amendment to the Constitution seeks to prevent the legislative branch of government from enacting laws which abridge the freedom of speech or of the press. Such a proscription is an express limitation on legislative power; but in the case at bar, the Georgia Supreme Court has permitted the legislative branch to pass beyond the confines of that express limitation. The legislature in Georgia now has the power to demark the areas of news coverage. Thus the decision effectively eliminates this constitutional limitation.[23]

4. Contrary to the rulings of this Court that no penalty, civil or criminal, may be imposed upon the truthful publication of matters of public interest, the Georgia Supreme Court in the case at bar has held

23. In this regard, Chief Justice Marshall observed as early as 1803 in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803): "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."

that the defendants may be held liable for civil damages. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). The Georgia Supreme Court has employed an erroneous rationale in reaching its decision totally contrary to the guidelines established by this Court for resolution of cases in the First Amendment libel-privacy area.

The Georgia Supreme Court ultimately decided the instant action by approving utilization of an *ad hoc* balancing approach which placed on the scales the various societal and individual interests relating to the instant case.

This aberration from binding and controlling precedents fosters media uncertainty and self-censorship. Beginning with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court has expressly rejected such an *ad hoc* balancing approach. This Court has defined, without any *ad hoc* balancing of interests, the kinds of speech that are constitutionally protected from libel and privacy judgments except upon clear and convincing proof of constitutionally defined "malice." These protected areas of free speech as defined by this Court include comments on actions of public officials, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), comments on the action of public figures, *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967), and comments on matters of public interest,[24] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metro-*

24. Under the above decisions, as applied to comments on public officials, public figures, and matters of general or public interest, recovery is permitted only if it is shown by clear and convincing proof that the defendants knew of the falsity of the statement or their actions were characterized by a reckless disregard of the truth or falsity (i.e., "actual malice").

media, 403 U.S. 29 (1971). This Court has applied the same rationale and standard to both libel-slander cases (*Sullivan, Butts,* and *Rosenbloom*) and to actions predicated on an invasion of privacy (*Hill*).

The Georgia Supreme Court totally disregarded these controlling precedents when it utilized an *ad hoc* balancing approach and remanded the case to the trial court for a jury determination on a "highly offensive" standard,[25] a standard which fails completely to meet the constitutional requirements articulated by this Court.

In the case at bar, the defendants respectfully submit that a proper application of contemporary constitutional doctrine compels the conclusions that the defendants' publication constituted the exercise of the rights of free speech and press to which they are constitutionally entitled, more particularly:

1. Since the publication in question related to a matter of public interest, the defendants' actions should have been held to be privileged under the rationale and holdings of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), and *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

2. Since the critical fact in the publication of which the plaintiff complains, i.e., the name of the

25. Specifically, the Georgia Supreme Court held: "Although the Appellee's complaint in this case stated a claim for relief, the public disclosure, admitted by the Appellants did not establish liability on the part of the Appellants as a matter of law. Whether the public disclosure actually invaded the Appellee's 'zone of privacy,' and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy *'with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive'* " (emphasis added). 231 Ga. at 64.

murder-rape victim, was contained in the criminal indictments and is a matter of public record, the Georgia Court should have held that under the decisions of this Court the news media is constitutionally entitled to truthfully publish all matters of public record.[26]

3. The defendants would submit that constitutional protection afforded the publication of matters of public interest necessarily extends to and includes the truthful publication of all facts which are published as a part of and are rationally related and relevant to a news story concerning a matter clearly of public interest. Such a rule is required under the holdings and rationale of this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny and has been articulated in this Court's decisions in *Time, Inc.* v. *Pape*, 401 U.S. 279, 290 (1971) ["rational interpretation"], and in *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) ["rationally related"].

Defendants respectfully submit that each of these approaches is consistent with the rationale and holdings of this Court and each supports the principles articulated by this Court to provide the certainty of constitutional protection which is needed to fulfill the historic role and meaning of the First Amendment. Suffice it to say, the decision by the Georgia Supreme Court in the case at bar totally fails in this regard and accordingly should be reversed.

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26. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). See also *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962); *Frith* v. *Associated Press*, 176 F.Supp. 671 (E.D. S.C. 1959).

II.

THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

In its order of February 19, 1974, this Court postponed further consideration of the jurisdiction until the argument on the merits. The appellants respectfully submit that all of the elements necessary for jurisdiction are present in this case and that the judgment of the Supreme Court of Georgia is final within the meaning of 28 U.S.C. § 1257(2).[27]

In the decision below, the Supreme Court of Georgia upheld the constitutionality of GA. CODE ANN. § 26-9901[28] and found that because of this statute the plaintiff's action was not constitutionally barred and the defendants' publication as complained of was not protected within the First and Fourteenth Amendments.[29] The decision of the Georgia Supreme Court is a final determination of the federal constitutional issues in this case, not subject to further review in Georgia and binding upon the trial court.

The plaintiff[30] and the defendants[31] both contend that no dispute exists as to any material fact in this case. The issues of fact which the Georgia Supreme Court remanded

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27. "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court . . . (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

28. Appendix to Jurisdictional Statement, A-26.

29. Appendix to Jurisdictional Statement, A-24, 25.

30. See Appellee's Motion to Dismiss or Affirm, p. 2.

31. Appellants' Jurisdictional Statement, pp. 9-10.

for determination[32] are wholly unrelated and separate from the constitutional issues before this Court. In addition, the Supreme Court of Georgia determined that the undisputed facts in this record were sufficient to permit their final, and now binding, judgment that "First Amendment proscriptions do not bind the claim of the Appellee against the Appellants in this case."[33]

In its decision the Supreme Court of Georgia concluded that although GA. CODE ANN. § 26-9901 does not of itself give rise to a civil cause of action for invasion of privacy,[34] the statute establishes the public policy of Georgia.[35] In the opinion for the majority of the Court on the motion for rehearing in the Supreme Court of Georgia, the Court held that

> "A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment. . . .

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32. "Whether the public disclosure actually invaded the Appellee's 'zone of privacy,' and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful and negligent disregard for the fact that reasonable men would find the invasion highly offensive." (Appendix to Jurisdictional Statement, A-17).

33. Appendix to Jurisdictional Statement, A-21.

34. Appendix to Jurisdictional Statement, A-12.

35. *Id.*

"We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state."[36]

This Court has long held that the requirement of finality is to be given a "practical rather than a technical construction"[37] and accordingly has employed a pragmatic approach to the question of "finality."[38] This practical construction of the requirement of finality is intended to facilitate "the smooth working of our federal system"[39] and to assure that where no factual or legal questions affect a definitive determination of the constitutional issues before the United States Supreme Court, this Court may act without undue delay to protect important federal substantive rights.[40] Thus, this Court has consistently found the requisite finality whenever the highest state court has conclusively determined the constitutional questions and the issues remaining to be resolved are unrelated to the constitutional questions before this Court.[41]

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36. Appendix to Jurisdictional Statement, A-24-26.

37. *Gillespie* v. *U. S. Steel Corp.*, 379 U.S. 148, 152 (1964); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

38. See *Brown Shoe Company, Inc.* v. *United States*, 370 U.S. 294, 306 (1962); *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U.S. 379, 381-83 (1953).

39. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945).

40. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). This rationale has been particularly emphasized where the Court has recognized that delay would threaten the exercise of the First Amendment rights. See *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, fn. 1 (1971); *Mills* v. *Alabama*, 384 U.S. 214 (1966).

41. *Local No. 438* v. *Curry*, 371 U.S. 542 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965) (opinion of Mr. Justice Goldberg not reported in *U.S. Reports*); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 38 L. Ed. 2d 379, 94 S. Ct. ..... (Dec. 5, 1973).

In determining whether the requirement of finality has been met, this Court has focused on the following criteria: whether the state judgment was a final ruling on the federal claim binding on lower state courts, with no further review possible in the state court system, *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local No. 438* v. *Curry*, 371 U.S. 542 (1963); whether postponing review would seriously erode a national policy, *Local No. 438* v. *Curry, supra, Rosenblatt* v. *American Cyanamid Co., supra, Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); whether the claim sought to be reviewed was separate from the factual and legal issues still to be determined in a state trial, *Brady* v. *Maryland*, 373 U.S. 83 (1963), *Mercantile National Bank* v. *Langdeau, supra, Local 438* v. *Curry, supra, Rosenblatt* v. *American Cyanamid Co., supra;* and finally, whether determination of the preliminary federal claim might avoid subsequent litigation. *Mercantile National Bank* v. *Langdeau, supra.*

Tested against these criteria the judgment of the Supreme Court of Georgia presents the requisite "finality" for review under 28 U.S.C. § 1257(2). The judgment is a final ruling on the constitutionality of the Georgia statute and a final rejection of the defendants' assertion of their First Amendment privilege. The judgment is binding on the lower State courts with no further review possible in those courts;[42] postponing a review of the constitutional issue will seriously erode the protection which the First Amendment affords newscasters;[43] the federal claim presented for review is separate from the issues still

42. *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local No. 438* v. *Curry*, 371 U.S. 542 (1963).

43. *Id.* See also, *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963).

to be determined in the State proceedings;[44] and determination of the appellants' First Amendment claim may avoid a long and costly trial and subsequent appeals[45] because further proceedings will be necessary only if this Court affirms the judgment of the Supreme Court of Georgia.

The highest court in Georgia has said that the statute is constitutional and because of the statute the defendants' activities were not constitutionally privileged. The defendant may win or lose this suit on the basis of a jury's determination of the non-constitutional issues of whether the defendants' publication actually invaded the plaintiff's privacy and if so, whether reasonable men would find the invasion "highly offensive." But the statute will have been validated in Georgia for all time unless this Court changes that result. Furthermore, should the plaintiff prevail on the judgment for damages, the defendants will again have to seek the only available review of the constitutional issues.

To postpone review of the constitutional questions now ripe for discussion on the possible premise that these defendants might prevail in the trial court or until another identical controversy returns the issue to this Court, will surely produce "a completely unnecessary waste of time and energy."[46] Given the "chilling effect" on First Amendment rights, such a result may be viewed as an intolerable invitation to legislatures to exercise a power similar to that which the Supreme Court of Georgia approved to enact varying regulations as to the content of the press.[47]

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44. *Id.* See also, *Brady* v. *Maryland*, 373 U.S. 83 (1963).

45. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963).

46. *Mills* v. *Alabama*, 384 U.S. 214, 217 (1966); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 38 L. Ed. 2d 379, 94 S. Ct. ..... (Dec. 5, 1973).

47. Appellants have been advised that the legislature of North Carolina is presently considering enactment of legislation similar to GA. CODE ANN. § 26-9901.

At every stage in this litigation Cox Broadcasting and Thomas Wassell have raised the constitutional issues with respect to the validity of GA. CODE ANN. § 26-9901 and have asserted that their publication in this case is constitutionally privileged. The defendants first raised the federal constitutional question in their answer.[48] The trial court in its original opinion[49] considered and expressly rejected these assertions. The constitutional questions were reargued to the trial court and in the defendants' Motion to Reconsider.[50] The issues were preserved and presented on appeal to the Supreme Court of Georgia.[51] The Supreme Court of Georgia considered the constitutional issues and decided in favor of the validity of GA. CODE ANN. § 26-9901, holding as well that the defendants' publication was not privileged under the First and Fourteenth Amendments.[52]

The judgment of the Georgia Supreme Court raises the substantial federal question of whether or not the legislative branch of government has the power to determine by fiat what "facts" should not be published because the legislature does not consider them to be of public interest and concern. The judgment in effect seats the legislature at the editor's desk and confers upon the legislature the power to regulate the content of the news reported in the mass media. The decision is a grave precedent which clearly threatens the free and vigorous press which has been acknowledged universally as vital to the American concept of liberty.[53]

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48. A. 9.
49. Appendix to Jurisdictional Statement, A-4.
50. A. 47.
51. A. 52-55.
52. Appendix to Jurisdictional Statement, A-21, 24, 25.
53. *Thornhill* v. *Alabama*, 310 U.S. 88, 94 (1940).

Accordingly the appellants respectfully submit that all of the requisites of 28 U.S.C. § 1257(2) are fulfilled in the case now pending before this Court. However, should the Court consider that appeal is not the appropriate procedure to be followed, then pursuant to 28 U.S.C. § 2103, the appellants respectfully request the Court to act upon the papers whereupon this appeal is taken as Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3).

III.

FEDERAL CONSTITUTIONAL QUESTIONS

A.

Ga. Code Ann. § 26-9901 As Construed and Applied by the Supreme Court of Georgia Abridges the Freedom of Speech and Press Guaranteed by the First and Fourteenth Amendments to the Constitution.

In challenging the constitutionality of 1968 GA. LAWS, pp. 1335, 1336 (GA. CODE ANN. § 26-9901)[54] as well as the decisions of the Georgia Supreme Court in this case, the defendants would commence by examining, rather than assuming, the power of the Georgia legislature to regulate the truthful publication of matters of public interest and facts appearing on the public record.

54. "It shall be unlawful for any news media or other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for misdemeanor."

The State's power to regulate speech is extraordinarily narrow in scope and exists, if at all, only upon a showing of grave and immediate danger to interests which the State may lawfully protect.[55] The decisions of this Court have defined the permissible areas of proper State regulation of First Amendment activity. For instance, in *Herndon* v. *Lowry*, 301 U.S. 242 (1937), a case holding unconstitutional a Georgia penal statute which proscribed the solicitation of members for a political party advocating violence in the overthrow of organized government, this Court stated:

> "The power of a state to abridge freedom of speech . . . is the exception rather than the rule . . . [and any] limitation upon individual liberty must [to avoid unconstitutionality] have appropriate relation to the safety of the State."[56]

Underlying this Court's evaluation of various State imposed restrictions upon the freedoms of speech and press has been the realization that "the safeguarding of [freedom of speech and press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

Though often challenged, this Court has never disturbed the foundation of the freedoms of speech and press guaranteed by the First Amendment:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters

55. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

56. *Herndon* v. *Lowry*, 301 U.S. at 258.

of public concern without previous restraint or fear of subsequent punishment."[57]

The various efforts to restrict the voice of the press have always been couched in terms of achieving worthy "social goals" which are thought to outweigh purportedly "minor restrictions" upon the freedom of the press.[58] However, this Court has consistently rejected these "balances" in favor of a profound constitutional commitment to a vigorous press providing the necessary information for the exigencies of our time.

This Court has invalidated efforts by the States to restrict the freedoms of speech and press in the name of fair elections, *Mills* v. *Alabama*, 384 U.S. 214 (1966); for the protection of personal reputation, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); in the interests of community morality, *Winters* v. *New York*, 333 U.S. 507 (1948); to combat racial discrimination in housing, *Organization for A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); and to protect national security, *New York Times Company* v. *United States*, 403 U.S. 713 (1971), to mention just a few. Additionally, this Court has also noted that truthful discussions of matters of public interest are protected from state interference. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

> "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. at 74.

The majority decision of the Georgia Supreme Court ignores this Court's consistent recognition and commit-

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57. *Thornhill* v. *Alabama*, 310 U.S. at 101.

58. As noted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), "There is never a paucity of arguments in favor of limiting the freedom of the press." (Mr. Justice Stewart, concurring).

ment to the preservation of First Amendment freedoms and totally fails to acknowledge that GA. CODE ANN. § 26-9901 abridges the freedom of press and speech mandated by the First Amendment and delineated by this Court.

By its terms GA. CODE ANN. § 26-9901 applies only to the media of public dissemination. The unmistakable purpose of this legislation is to regulate the content of the news media. The statute prohibits "public dissemination" of the victim's name by the news media, but significantly, it does not prohibit the private discussion of the incident or the victim's name between individuals, nor does it prevent the girl's name from becoming a part of the public record, e.g., listed in an indictment or mentioned in open court.

This statute does not restrict the right of individuals to discuss the name of the victim. No such restriction is imposed on the victim, her parents, the defendants, the state prosecutor, the grand jury, the victim's friends and neighbors, the witnesses to the incident, or even persons of idle curiosity who seek to inform themselves about all the facts and circumstances surrounding the incident. This statute is directed *exclusively* at the exercise of those same rights by the news media.

Aside from the Supreme Court of Georgia's "finding" that GA. CODE ANN. § 26-9901 stems from a legislative determination that the publication of the name of a rape victim is not a matter of public interest or general concern in the State of Georgia, evidence in support of this position is minimal. Indeed, the statute itself and the arguments advanced in its support suggest that the law was passed to protect the rape victim from the intense public

interest which in fact surrounds the crime and those involved in the crime.[59]

In the case upon which both the plaintiff and the Supreme Court of Georgia have relied, *Wisconsin* v. *Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948), the court concluded that the statute was intended to save from embarrassment and offensive publicity women who have been the subject of the kind of assault delineated in the statute and was further intended to aid law enforcement officers to more readily obtain evidence for the prosecution of such criminal offenses. 33 N.W.2d at 309. The court realized that publication of the victim's name could in some circumstances be a matter of interest to the public, although the court describes such interest as "a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim."[60]

Because of its apparently erroneous belief that twenty states had enacted similar laws, the Wisconsin court appears to have been strengthened in its resolve that the statute, though an infringement of freedom of press, serves justifiable ends.

> "It was to prevent this [personal suffering and embarrassment] and aid prosecuting officers that the legislature of this and 19 other states have enacted laws of this general character."

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59. The Georgia statute was first passed in 1911. Statutes 1911, p. 179, GEORGIA CRIMINAL CODE ANN. § 343 (1914). The statute was recodified as GA. CODE ANN. § 26-2105 (1953). In 1968 the present version of the statute was enacted expanding the prohibitions to include the broadcast media.

The one authority in examining the available evidence suggests that the motivation for the statute was gallantry, perhaps combined with racial overtones. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions On Reporting of Fact*, 16 STAN. L. REV. 107, 128 (1963).

60. 33 N.W.2d at 312.

This statement is made without citation of any authority. Our research fails to reveal that any states other than Florida, South Carolina, Georgia, and Wisconsin have ever enacted any statutes even remotely similar to that in question.[61] One scholar has conducted an examination of the briefs filed in *Evjue* and reports that no compilation of such statutes was provided to the Supreme Court of Wisconsin or has otherwise been uncovered.[62]

In other reported cases which deal with a news report of the identity of a victim of a sexual offense, the courts have concluded that the identity of the victim or her family was newsworthy and a matter of public interest and have accordingly denied recovery. For example, in *Wagner v. Fawcett Publications, Inc.*[63] the Seventh Circuit, after withdrawing its first opinion, concluded that the publication of news stories concerning the rape-murder of the plaintiff's daughter two months after the crime was not actionable as an invasion of privacy because the report was newsworthy.[64] The plaintiff claimed an invasion of privacy because of the defendant's publication of her daughter's name and picture in stories purporting to tell of the killing of her daughter. The trial court dismissed the complaint. In its first opinion the Court of Appeals reversed the dismissal on the grounds that the trier of fact could find that the defendant published the article months after the girl's death had ceased to be news.

On rehearing, however, it was brought to the court's attention that the criminal proceedings surrounding those

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61. See 1911 FLORIDA LAWS, c. 6226, § 1, 1952 SOUTH CAROLINA CODE § 16-81 (1952), 1955 WISCONSIN LAWS § 942.02.

62. Franklin, *supra* at 107.

63. No. 13541 (7th Cir. June 18, 1972) *reversed on rehearing*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963). The first opinion was withdrawn and was not published.

64. *Id.*

accused of the crime against the plaintiff's daughter *were taking place at the time of the publication.* The court then belatedly concluded that the facts established that when the defendant published the article, his subject matter related to current news. Thus under Illinois law the court affirmed the dismissal of the complaint.[65]

In *Hubbard* v. *Journal Publishing Company*, 69 N.M. 473, 368 P.2d 147 (1962), the plaintiff brought suit against the publisher of a newspaper article for invasion of her privacy, alleging that she had, in effect, been identified as the victim of the sexual assault and that she had suffered extreme humiliation and mental distress.[66] The Supreme Court of New Mexico affirmed a summary judgment for the defendant on three grounds: (1) Since the facts were of public record, the newspaper was privileged to print the stories; (2) The article was accurate and newsworthy; and (3) Although the plaintiff was an involuntary participant in the matter, she fell within the group of persons who may be examined before the pubic eye and have their misfortunes broadcast to the world.[67]

Indeed, the breadth of "facts" which have been held worthy of publication is so broad as to conclusively show that, absent the statute in the present case, the publication of the name of a rape victim in connection with the news

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65. 307 F.2d at 412. For discussion of this case see, *The Right of Privacy: Normative—Descriptive Confusion of Newsworthiness,* 30 U.CH.L.REV. 722, 726 (1963).

66. The article appeared in the *Albuquerque Journal* in July, 1960: "Richard Hubbard, 16, son of Mrs. Ann Hubbard, 532 Ponderosa NW, was charged with running away from home, also prior to date, he several times endangered the physical and moral health of himself and others by sexually assaulting his younger sister. The court ordered a suspended sentence to the New Mexico Boys' Home on the condition he serve sixty days in the Juvenile Detention Hall." 69 N.M. at 474, 368 P.2d at 147.

67. 69 N.M. at 475, 368 P.2d at 148-149.

coverage of the trial of those accused of the crime was "newsworthy" and of public interest.[68]

The decisions of this Court in the First Amendment area have established that whether a subject is a matter of "public interest" is an issue to be determined by the Court. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), wherein this Court first applied the constitutional privilege for an action for invasion of privacy this Court found *as a matter of law* that:

> "the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest." 385 U.S. at 388.

Similarly in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), the Court indicated that the determination as to whether a matter is of "public interest" is a matter of law and noted that "First Amendment questions of 'constitutional fact' compel . . . *de novo* review (on appeal)."[69]

> "We think the time has come forthrightly to announce that the determinant whether the First Amendment

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68. Among the events which have been found worthy of publication are: a woman's conduct during the murder of her husband on the street, *Jones* v. *Herald Post*, 230 Ky. 227, 18 S.W.2d 972 (1929); plump women reducing in a gym with humorous apparatus, *Sweenek* v. *Pathe News, Inc.*, 16 F.Supp. 746 (E.D. N.Y. 1936); performance of the Indian rope trick, *Lahiri* v. *Daily Mirror Inc.*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937); public suicide, *Metter* v. *Los Angeles Examiner*, 35 Cal. App.2d 304, 95 P.2d 491 (1939); dissuasion from public suicide, *Samuel* v. *Curtis Publishing Company*, 122 F.Supp. 327 (N.D. Cal. 1954); a gambling raid in which the plaintiff was an innocent bystander, *Themo* v. *New England Newspaper Publishing Company*, 306 Mass. 54, 27 N.E.2d 752 (1940); *Jacova* v. *Southern Radio and Television Company*, 83 So.2d 34 (Fla. 1955); Cf. *Schnabel* v. *Meredith*, 378 Pa. 609, 107 A.2d 830 (1954); police treatment of a prisoner, *Hull* v. *Curtis Publishing Company*, 182 Pa. Super. 86, 125 A.2d 644 (1956); the appearance of a murder victim, *Waters* v. *Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956); the appearance of a murder victim's family, *Jenkins* v. *Dell Publishing Company, Inc.*, 251 F.2d 447 (3rd Cir. 1958); the birth of a child to a 12 year old girl, *Meetze* v. *Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

69. *Rosenbloom* v. *Metromedia*, 403 U.S. at 54.

> applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." 403 U.S. at 44-45.

This result is consistent with the Court's initial determination in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966) that questions of privilege are matters of law.[70]

> "We remark only that, as in the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" 383 U.S. at 88.

The decisions which have addressed the issue of the nature and definition of a newsworthy event further support appellants' contentions in this regard. For instance, the court in *Associated Press* v. *International News Service*, 245 F. 244, 248 (2nd Cir. 1917), *aff'd*, 248 U.S. 215 (1918), declared that newsworthy matters are those which have "that indefinable quality of interest, which attracts

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70. Public interest has consistently been found by Federal Circuit Courts as a matter of law. *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Cerrito* v. *Time, Inc.*, 302 F.Supp. 1071 (N.D. Cal. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); *Firestone* v. *Time, Inc.*, 460 F.2d 712 (5th Cir. 1972), *cert. denied*, 409 U.S. 875 (1972); *Time, Inc.* v. *McLaney*, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); *Bon Air Hotel, Inc.*, v. *Time, Inc.*, 295 F.Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970); *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970); *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971); *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970); *Medina* v. *Time, Inc.*, 319 F.Supp. 398 (D. Mass. 1970), *aff'd*, 439 F.2d 1129 (1st Cir. 1971); *Cervantes* v. *Time, Inc.*, 330 F.Supp. 936 (E.D. Mo. 1971), *aff'd*, 464 F.2d 986 (8th Cir. 1972).

Federal District Court decisions are in accord. *Goldman* v. *Time, Inc.*, 336 F.Supp. 133 (N.D. Calif. 1971); *Sellers* v. *Time, Inc.*, 299 F.Supp. 582 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3rd Cir. 1970), *cert. denied*, 400 U.S. 830 (1970); *Hensley* v. *Life Magazine, Time, Inc.*, 336 F.Supp. 50 (N.D. Cal. 1971); *Blanke* v. *Time, Inc.*, 308 F.Supp. 378 (E.D. La. 1970); *Konigsberg* v. *Time, Inc.*, 312 F.Supp. 848 (S.D. N.Y. 1970); and *Spern* v. *Time, Inc.*, 324 F.Supp. 1201 (W.D. Pa. 1971).

public attention." The court in *Jenkins* v. *News Syndicate* 128 Misc. 284, 285, 219 N.Y.S. 196, 198 (1926), defined news as "a report of recent occurrences." And in *Sidis* v. *F-R Publishing Corporation,* 113 F.2d 806, 809 (2nd Cir. 1940), the court stated:

> "Regretably or not, the misfortunes and frailties of neighbors . . . are subjects of considerable interest and discussion open to the rest of the population."

The fact that an otherwise private person becomes an unwilling actor in an event of public interest in no way lessens the degree of public interest in that individual's role in the newsworthy event. In *Rosenbloom* v. *Metromedia,* 403 U.S. at 43 (1971), this Court declared:

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."

See also *Cerrito* v. *Time, Inc.,* 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 861 (5th Cir. 1970); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.,* 404 F.2d 706, 710-11 (9th Cir. 1968), *cert. denied,* 394 U.S. 921 (1969); *Konigsberg* v. *Time, Inc.,* 312 F.Supp. 848, 851 (S.D. N.Y. 1970).

Judged by these standards, the name of the victim of a rape or an attempted rape can be, and often is, clearly a matter of public interest and concern. This is true particularly where the name is a matter of public record, for example, where criminal charges proceed against those accused of a crime, and the name of the victim is used to identify the crime.[71] Additionally, the name of the rape

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71. The publication of reports of judicial proceedings has been recognized to be of public interest by the legislature through the enactment of a statutory privilege for fair and accurate reports of proceedings of legislative or judicial bodies. GA. CODE ANN. § 105-709(4).

victim is of public interest in that it may aid in identifying and securing witnesses to the crime.[72] The name may also identify a particular crime so that the public can be informed that the criminal processes are going forward in that instance without any improper interference.

Thus the appellants respectfully submit that GA. CODE ANN. § 26-9901 represents an effort to regulate the truthful publication of information concerning a matter of public interest, i.e., the identity of the victim of a crime, and thereby abridges the freedom of press and speech guaranteed by the First and Fourteenth Amendments. Consequently, the said statute is unconstitutional and without force of law.

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72. As noted by Professor Franklin in a law review article on this subject, the defendants are entitled to such assistance in forming their defense: "It is necessary to turn to the interest of a third party who often enters the picture—the accused rapist who might argue that such a statute is a hindrance to the conduct of his defense. For example, his defense may be consent, supported by testimony of others in the community as to complainant's chastity and her reputation for veracity. If the defendant and complainant are members of the same social group this may not be difficult, but if defendant is a stranger to the area or to complainant's social environment, her identification would be helpful in finding others who might come forward and testify to her poor reputation for morality or veracity. This might also apply to witnesses who saw the complainant shortly after the alleged attack and can testify to her apparent calm and unruffled manner. Although gathering witnesses is a job for the defense, every impediment to the accused in the preparation of his defense is contrary to our notions of a fair trial. These arguments might also be raised by the press. . . . Even if constitutional when no trial is held, identity restrictions should fall when the victim testifies in a public trial. *When a major criminal trial is held a witness's identity may be vital for full understanding of the proceedings and outcome. The full glare of publicity may also serve to expose false claims by the alleged victim. The newspaper's functions of providing information of major public events such as trials and its close relationship to the fair administration of justice are both vindicated by allowing the press, as well as the defendant, to make this contention*" (emphasis added). See Franklin, *A Constitutional Problem In Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 137 (1963).

B.

Ga. Code Ann. § 26-9901 Prohibiting the Publication of the Name of a Victim of a Rape Is Unconstitutionally Overbroad in Violation of the First and Fourteenth Amendments to the Constitution of the United States.

GA. CODE ANN. § 26-9901 prohibits the publication by the news media of the name or identity of the victim of a rape or an attempted rape *in all circumstances*, regardless of whether or not the publication of the name may be or is a matter of legitimate public interest and concern. Thus, the statute includes within its broad prohibitions truthful publications concerning public officials, public figures, and matters of public interest which the Court has held to be protected by the First and Fourteenth Amendments to the Constitution. *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). Accordingly, the statute is constitutionally overbroad on its face and in its application.

This Court has utilized the overbreadth doctrine most frequently to void state regulations of the First Amendment activites which seek to further a proper governmental purpose but which on their face or in their applications sweep unnecessarily broadly and thereby invade the area of protected freedoms. See *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Additionally, this Court has not hesitated to apply this principle in order to protect other constitutional freedoms from overly broad state encroachment. See

NAACP v. *Button*, 371 U.S. 415 (1963) (freedom of association); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964) (freedom of travel); and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (academic freedom). See also *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Schneider* v. *State*, 308 U.S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *NAACP* v. *Alabama*, 377 U.S. 288 (1964). Thus it is clearly established that a statute that is overly broad in its proscriptive sphere and invades protected freedoms, especially First Amendment freedoms as in the case at bar, is constitutionally invalid and unenforceable.

The unlawful overbreadth of GA. CODE ANN. § 26-9901 is easily shown by the statute's flat prohibition under all circumstances of the publication by the news media of the name of the victim of a rape or an attempted rape. The statute:

1. prohibits the news media from publishing the name or identity of the victim of a rape or an attempted rape without regard to whether or not the publication of the name is or might be a matter of legitimate public interest and concern; and

2. prohibits *all* publications without regard to truth, reasonableness, newsworthiness of the event or person, public interest, or timeliness. For example, this statute, as construed by the Supreme Court of Georgia, applies not only to the publication of the name or identity of the victim of a rape or an attempted rape upon whom another felonious crime may have been perpetrated or who may otherwise be a matter of legitimate public interest and concern.

The statute *goes far beyond* what might be arguably justified in the exercise of the state's legitimate authority to protect its vital interests. The broad reach of the stat-

ute outstrips the rationale which might support its narrow application in those circumstances where it might be shown that no matter of public interest was involved.

Thus, such broad prohibition clearly sweeps within the protected area of the First and Fourteenth Amendments to the Constitution of the United States and thereby renders the GA. CODE ANN. § 26-9901 unconstitutional.

C.

The Georgia Supreme Court Erroneously Determined That the Georgia General Assembly Can Regulate the Content of News Publication by Legislatively Declaring Certain Facts Not of Public Interest and Concern.

Another alarming and erroneous determination by the Georgia Supreme Court in the case at bar is the majority's conclusion that "the General Assembly of Georgia had a perfect right to declare that the victim of [a rape or an attempted rape] should not be publicly identified by the news media" and that "because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state."[73]

This conclusion is premised upon the majority's belief that the state legislature has the power to determine what facts are not a matter of public interest and concern and to thereby withdraw the constitutional protection afforded the truthful publication of matters which are, in fact, clearly matters of public interest. The Georgia Court, without citation or discussion of a single decision of this

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73. Appendix to Jurisdictional Statement, A-24-26.

Court, supports this conclusion with the bare assertion that the First Amendment is not absolute.[74]

With all due respect, the appellants submit that the reasoning of the Georgia Supreme Court is in error and its reliance on the rejection of "absolutism" under the First Amendment is misplaced. There is no issue here as to whether or not the First Amendment is "absolute." This Court has confined state regulation in the First Amendment field to an exceptionally narrow and limited area. See *Herndon* v. *Lowry*, 301 U.S. 242 (1937); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The issue is whether the Georgia Supreme Court erred in holding that the State legislature is empowered to unilaterally determine what publications are not entitled to constitutional protection by legislatively deciding what matters it feels are not of "publice interest and concern."

Under the decision of the Supreme Court of Georgia in the instant action, the legislature in Georgia is free to determine which other "facts" are not, in the judgment of the legislature, sufficiently of "public interest" to merit publication and to prohibit the news media from publishing such "facts." Such a determination need not be influenced by considerations of whether or not the "fact" is true or of the particular circumstances surrounding the event; of whether the "fact" was a matter of current public debate; of whether the "fact" is incorporated in a news story which is fair and accurate; of whether the "fact" is a matter of public record and available to any interested person. All the legislature need determine is that, in their judgment, the publication of this "fact" is not a matter of public interest and general concern.

74. "However, despite the late Mr. Justice Black's absolutist position with regard to the First Amendment, we know that his position has never been adopted by the Supreme Court of the United States" (Appendix to Jurisdictional Statement, A-18).

Vesting such authority in the Georgia legislature is directly contrary to the express limitations on governmental power contained in the First Amendment guarantees of freedom of speech and press. By its terms the First Amendment seeks to prevent the legislative branch of government from enacting laws which abridge freedom of speech and press. If the Georgia legislature does indeed possess the "perfect right" or power to define the areas of "public interest" in news publications then constitutional limitations of the First Amendment have been abridged and, indeed, eliminated. The power to legislatively determine and define newsworthiness, even by a majority vote, will subject the public to a press which is limited to the publication of "approved" facts. Such a power is perhaps the most direct, notorious and open abridgment of the First Amendment imaginable.

Additionally, such a broad legislative mandate harbors foreboding implications. As first and moderate methods to attain a "responsible press" which publishes information "in the public interest" prove unsatisfactory to the government, those bent on achieving a "responsible press" must apply measures of ever increasing severity. A government empowered to *prohibit* the publication of matters which are not "in the public interest" needs no new or additional power to *require* the publication of matters determined to be in the public interest.[75]

An acknowledgment of the power in government to regulate the content of the news media invites its use. As governmental pressure towards a "responsible press" grows and the news media is forced to refrain from publishing matters other than those which are "in the public interest," the strife will become more bitter as to whose "public interest" it shall be.

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75. See, *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ..... (73-797, argued April 17, 1974).

> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 641.

By reason of the foregoing, we respectfully submit that GA. CODE ANN. § 26-9901, as construed by the Supreme Court of Georgia rests upon the assertion of a power constitutionally forbidden the legislature and must be declared unconstitutional as an abridgment of the freedom of the press.

D.

The Georgia Supreme Court Erred in Holding That Plaintiff's Privacy Action Is Not Barred by the Defendants' Freedoms of Speech and Press under the First and Fourteenth Amendments to the Constitution of the United States.

Appellants respectfully submit that the Georgia Supreme Court's holding that they may be subject to civil liability under an invasion of privacy theory for their publication of a newsworthy fact in a timely news story concerning a matter of public interest is constitutionally unsupportable. The Georgia Court's rationale and decisions are wholly unsupported by and directly contrary to the principles established by this Court in a clear line of controlling decisions. See *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64

(1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). Specifically, the Georgia Supreme Court erroneously concluded that it was proper for it to engage in an *ad hoc* balancing of interests, a weighing of the conflicting societal values in order to determine whether the particular speech in issue is protected by the First Amendment. The Georgia Court in this case resolved the "head-on" collision between the First Amendment and the right of privacy by finding that because of GA. CODE ANN. § 26-9901 the publication was not a matter of public interest and thus liability could be imposed if the jury found the publication in question to be "highly offensive" to a reasonable man.[76]

Aside from the Georgia Court's decision on the constitutionality of the statute, the Court's decision reflects three additional fundamental errors in failing to recognize that:

> (1) No civil cause of action (whether for libel or invasion of privacy) can be constitutionally maintained as a consequence of the truthful publication of facts concerning a matter of public interest.[77] Neither the legislature nor the courts are constitutionally free to balance on an *ad hoc* basis the "conflicting societal values" so as to justify the imposition of civil or criminal sanctions upon truthful publications of public interest.[78]

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76. The Georgia Supreme Court remanded the entire case to the trial court for a determination of both liability and, if necessary, damages on the following standard: "And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy *with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive.*" Appendix to Jurisdictional Statement, A-17 (emphasis added).

77. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971).

78. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

(2) The publication of the name of this deceased victim of an alleged murder-rape was constitutionally protected as a matter of public record.

(3) The publication of the name of this deceased victim of an alleged murder-rape was constitutionally protected as a relevant fact rationally related to the discussion and report of a matter of public interest.

1.

The Constitutional Freedoms of Speech and Press Preclude an Action for Invasion of Privacy for the Publication of Facts Concerning a Matter of Public Interest.

Though often challenged, the principle enunciated by this Court which has emerged as the contemporary foundation of the freedoms of speech and press has been that the press is free to truthfully discuss and publish all matters relating to public officials, public figures, and *public interest* and without previous restraint or fear of subsequent punishment. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-103 (1940); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Company* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229, 230 (1972).[79]

79. In framing this constitutional principle, the Court has endeavored to define "areas" of constitutionally protected speech instead of balancing. Prior to this Court's decision in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court considered it appropriate to engage in an *ad hoc* balancing of interest in each case in order to resolve First Amendment disputes. See *American Communications Association* v. *Douds*, 339 U.S. 382 (1950); *Dennis* v. *United States*, 341 U.S. 494, 524-25 (1951) (Mr. Justice Frankfurter concurring); and *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *NAACP* v. *Alabama*, 357 U.S. 449, 463, 464 (1958); *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 51 (1961). Such was the procedure followed by the majority of the Georgia Supreme Court in this case.

Georgia courts have long recognized the privilege to publish matters relating to subjects of public interest. In *Waters* v. *Fleetwood*, 212 Ga. at 167, 91 S.E.2d 344 (1956), the Supreme Court of Georgia denied recovery to the parents of a girl whose murdered body had been photographed and published by the defendant. The court observed:

> "There are many instances of grief and human suffering which the law can not redress. The present case is one of those instances. *Through no fault of petitioner or her deceased child, they became the objects of widespread public interest.* The murder of the petitioner's daughter necessarily became a *matter of legal investigation* and the *subject matter of public records.* During the pendency and continuation of the investigation, and until such time as the perpetrator of the crime may be apprehended and brought to justice under the rules of our society, *the matter will continue to be one of public interest*, and *the dissemination of information pertaining thereto would not amount to a violation of the petitioner's right of privacy*" (emphasis added). *Supra* at 167.

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court expressly held:

> "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." 379 U.S. at 74.

Beginning with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), however, and since consistently followed by this Court in *Butts*, *Hill*, and *Rosenbloom*, this Court has rejected the "balancing" test and has resolved First Amendment issues by delimiting areas of constitutionally protected speech, rather than endeavoring in each case to balance the various societal interests. This new approach was predicated upon the conviction that the news media under the balancing rationale was confronted with broadcast uncertainty resulting in self-censorship.

This Court has made it abundantly clear that the freedoms of speech and of press protect publications of matters of public interest from actions for invasion of privacy as well as for libel. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). In that case, plaintiff sued for an invasion of privacy based on the publication of the story which falsely reported that the Broadway play *The Desperate Hours* reflected the ordeal of the plaintiff's family at the hands of a group of escaped convicts. Setting aside a judgment for the plaintiff, the Court held that the constitutional privilege which applies to publications in libel actions applies with equal force in an action for invasion of privacy.

> "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[80]

Since *Time, Inc.* v. *Hill* was decided, Federal courts have unanimously recognized that *truth* is a complete constitutional defense to all actions for invasion of privacy based upon news reports discussing events of public interest.[81]

Moreover, it is important to note that the fact that an otherwise private person becomes an unwilling actor

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80. *Time, Inc.* v. *Hill*, 385 U.S. 387, at 388.

81. See, e.g., *Goldman* v. *Time, Inc.*, 336 F.Supp. 133 (N.D. Cal. 1971), publication of an article about young Americans wandering through Europe; *Cullen* v. *Grove Press, Inc.*, 276 F.Supp. 727 (S.D. N.Y. 1967), injunction denied to prevent distribution of film portraying conditions in public mental institutions; *DeSalvo* v. *Twentieth Century-Fox Film Corporation*, 300 F.Supp. 742 (D. Mass. 1969), injunction denied to prevent release of motion picture *The Boston Strangler; Cantrell* v. *Forest City Publishing Company*, ... F.2d ..... (6th Cir. 1973), judgment for invasion of privacy reversed where publication concerning the effect upon the widow and child of an individual who lost his life when a bridge across the Ohio River collapsed.

in an event of public interest, as in the present case, in no way lessens the degree of public interest and the individual's role in the newsworthy event. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 43 (1971); *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 861 (5th Cir. 1970); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706, 710, 711 (9th Cir. 1968).

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view *both private citizens and public officials*. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. *The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.* 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940)" (emphasis added) *Time, Inc.* v. *Hill*, 385 U.S. at 388.

Closely related to this constitutional privilege has been the recognition that the right of privacy does not extend to discussions which concern or affect matters of public interest. Such is clearly revealed from a brief analysis of the development of the right of privacy.

The concept of a "right of privacy" has its genesis in an 1890 Law Review article written by Brandeis and an associate.[82] The concept arose from the fundamental de-

82. Warren and Brandeis, *The Right of Privacy*, 4 HARV. LAW REVIEW 193 (1890).

sire of the individual "to be let alone."[83] The Georgia Supreme Court was one of the first judicial bodies to officially recognize this right, *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190, 50 S.E. 8 (1905). The right of privacy has now been recognized in at least twenty-seven (27) jurisdictions.[84] Although the scope of the right has been variously defined,[85] it is remarkable that *without exception* the authorities and the commentators note that the freedoms of speech and of the press limit the right of privacy. For example,

> *"The right of privacy does not prohibit any publication of matter which is of public or general interest."*[86]

In recognizing the right to privacy and the civil actions for its invasion, the Supreme Court of Georgia noted:

> *"It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press. . . . The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest.* The truth may be uttered and printed in reference to the life, character, and conduct of individuals whenever it is necessary

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83. COOLEY, TORTS, 29 (2nd Ed. 1888).

84. For a discussion of those jurisdictions recognizing this right, see Prosser, *Privacy*, 48 CAL. L. REV. 383, 386-87 (1960).

85. Dean Prosser describes the "right" in terms of four related torts:

> "(1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
>
> (2) Public disclosure of embarrassing private facts about the plaintiff.
>
> (3) Publicity which places the plaintiff in a false light in the public eye.
>
> (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.* at 389.

86. Warren and Brandeis, *supra*, p. 214.

to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion" (emphasis added). *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190, 204, 50 S.E.2d 68, 71, 72 (1905).

In his distinguished study, *Government and Mass Communications*, Professor Chafee[87] disapproved of the New York statute which provided a civil cause of action for invasion of privacy coming from the unauthorized use of one's photograph.[88] Professor Chafee admitted that although he was not concerned with the unauthorized use of pictures in advertising, the impact of the privacy on documentary films could be significant.[89] Chafee recommended

> "that respect for privacy be left to public opinion and the conscience of owners and editors." Chafee, *supra*, 138.

In *Brisco* v. *Reader's Digest Association, Inc.*, 93 Cal. Rptr. 866, 483 P.2d 34 (1971), cited by the majority of the Georgia Court,[90] the California Supreme Court held that the defendant's publication of the plaintiff's criminal record some eleven years after his conviction created a jury question to determine whether the plaintiff's identity was "newsworthy." *Brisco* did not involve a statutory prohibition, as in the present case, and the court expressly reserved its opinion as to the constitutionality of such statute.[91] The court in *Brisco*, however, explicitly indicated that the right of privacy is subject to the limitations of the right of the free press.

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87. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947).

88. NEW YORK CIVIL RIGHTS LAW § 50, 51.

89. Chafee, *supra*, 137.

90. Appendix to Jurisdictional Statement, A-14, 20-21.

91. "We of course express no opinion on these matters." 482 P.2d at 39.

"There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life. Reports of these events may also promote the value served by the constitutional guarantee of a public trial. Although a case is not to be 'tried in the papers,' reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and friends or relatives to come to the aid of the victim."[92]

The result in *Brisco* was largely tied to the fact that a majority of the California Court was offended by a publication of the plaintiff's past criminal conduct some eleven years after the fact. In the present case, the report concerned current criminal activities expressly recognized in *Brisco* as the province of a free press.[93] To the extent that *Brisco* indicates that publication of facts of and related to matters of public interest can be constitutionally prohibited because they are "offensive," the case is wrongly decided.[94]

The principle readily distilled from the above-cited authorities and cases is that the First Amendment to the Constitution protects all truthful publications involving matters relating to public officials, public figures, and most importantly for the purposes of the case at bar, matters of and relating to public interest, even as against civil

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92. 483 P.2d at 39.

93. *Id.*

94. See *Winters* v. *New York*, 333 U.S. 507 (1948); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

See also *Sidis* v. *F-R Publishing Corp.*, 113 F.2d 806 (2nd Cir. 1940); *Smith* v. *Doss*, 37 So.2d 118 (Ala. 1948); *Barbieri* v. *News-Journal Company*, 189 A.2d 773 (Del. 1963).

actions predicated on the right of privacy, as such a right is limited by the First Amendment's freedoms of speech and press, and not vice versa. Since the broadcast here in question was an accurate, factual account concerning matters of substantial public interest, including the publication of the victim's name, as heretofore discussed in detail (pp. 17, 18, 39, 40 of this brief, *supra*), the First Amendment precludes the plaintiff's claims against the defendants for invasion of privacy. Accordingly, this case should have been resolved by a ruling on defendants' Motion for Summary Judgment because the publication was a matter of public interest and within that constitutionally protected area of free speech and press. The Georgia Supreme Court, however, totally disregarded the controlling precedents of this Court and this, appellants contend, was and is reversible error.

2.

The Privilege to Publish All Matters of Public Interest and Concern Embodied in the Constitutional Freedoms of Speech and Press Logically Requires the Further Privilege to Discuss and Accurately Publish Facts Which Appear on Public Records.

Appellants respectfully submit that an essential corollary to the freedom to publish concerning matters of public interest is the right to truthfully discuss and publish facts on the *public record*. *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).[95] Inasmuch as the application of the constitutional "public interest" privilege, although sound and essential to the full meaning and function of the First Amendment, must

95. In this regard, in *Metromedia*, Mr. Justice White also indicated, in a similar vein, the need to afford an absolute privilege to discuss the public acts of public officials without limitations as to the wholly private individuals involved or affected. 403 U.S. at 62.

be finally resolved subsequent to the publication, further refinement of this said privilege that eliminates or minimizes this aspect of the privilege would seem warranted. Otherwise, a certain degree of uncertainty and self-censorship may linger on.

A further definition and refinement of "public interest" in this area would thus seem desirable and justified. The "public record" privilege,[96] herein advocated by appellants, is just such a refinement. Protection of the publication of matters of public record, which already constructively are a matter of public interest and undoubtedly of interest to some segment of the public, would eliminate a portion of the uncertainty and tendency toward self-censorship that still remains today. Furthermore, such a privilege would be administratively feasible as few disputes would arise as to whether a matter was actually on the public records, and such could be determined by the court as a matter of law. The scope of such a "public record" privilege would be no more difficult for the courts to administer than the similar rule in *Sullivan* with respect to public officials.

Additionally, establishment of this "public record" privilege would foster and assure the viability and continued efficacy of the historical responsibility of the press to provide the public with all the information it requires to meet the exigencies of society. This responsibility necessarily includes the freedom of the press to publish and express facts and views that do not necessarily appeal to

96. Georgia law provides for such a privilege with respect to legislative and judicial proceedings; GA. CODE ANN. § 105-704, 709(4): "A fair and honest report of the proceedings of legislative or judicial bodies, or of court proceedings, or a truthful report of information received from any arresting officer or police authorities, shall be deemed a privileged communication; and in any action brought for newspaper libel, the rule of law as to privileged communications shall apply . . . 4. Fair and honest reports of the proceedings of legislative or judicial bodies."

the interest of a majority of the public, but may only appeal to a limited and minority segment thereof. Matters on file in the public record encompass a broad range of topics and facts that are of interest and assistance to many (and perhaps even a few) varied and different individuals or segments of the population. Freedom of the press, if it is to have meaning, must be interpreted to assure dissemination of facts and ideas that may be of interest to only a few individuals or to a small segment of the population. To hold otherwise would be to deny these persons and groups access to, and conversely the news media the right to publish, information of value to them in "meeting the exigencies" of their particular circumstances—a proscription which, in aggregate terms, rises to substantial proportions. The privilege to publish matters of "public record" would go far toward the full dissemination of all factual matters which might aid the public in conducting and meeting the "exigencies" of their lives, even the remotest individual or smallest segment of the general populace.

In addition to the fact that such a "public record" privilege is a necessary corollary of the holdings of this Court [*Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967)], it has been judicially recognized. For example, in *Hubbard* v. *Journal Publishing Company*, 69 N.M. 473, 368 P.2d 147 (1962), the plaintiff brought suit against the publisher of a newspaper article for invasion of her privacy.[97] The plaintiff alleged that she had, in effect, been identified as the victim of

97. The article appears in the *Albuquerque Journal* in July, 1960: "Richard Hubbard, 16, son of Mrs. Ann Hubbard, 532 Ponderosa NW, was charged with running away from home; also prior to date, he several times endangered the physical and moral health of himself and others by sexually assaulting his younger sister. The court ordered a suspended sentence to the New Mexico Boys' Home on the condition he serve sixty days in the Juvenile Detention Hall." 69 N.M. at 474, 368 P.2d at 147.

a sexual assault and that she had suffered extreme humiliation and mental distress.[98] The Supreme Court of New Mexico affirmed a summary judgment for the defendant on three grounds:

> 1. *Since the facts were of public record, the newspaper was privileged to print the stories*;
>
> 2. The article was accurate and newsworthy; and
>
> 3. Although the plaintiff was an involuntary participant in the matter, she fell within the group of persons who may be examined before the public eye and have their misfortunes broadcast to the world.[99]

This "public record" privilege was also explicitly recognized by the district court in *Frith* v. *Associated Press*, 176 F.Supp. 671 (E.D. S.C. 1959). That case involved the publication of photographs and related news stories of and pertaining to the plaintiffs who had been arrested for a particularly notorious criminal assault on the high school band director in Camden, South Carolina. The photographs had been taken by the South Carolina officials and were distributed to the news media by an assistant of the Governor of South Carolina during the Governor's press conference announcing the said arrest. These said photographs were considered and deemed to be "official records" of the State of South Carolina. In granting the defendants' motions for Judgment on the Pleadings and Summary Judgment, the court explicitly recognized the "public record" privilege and predicated its decision, in part, thereon, having stated in so holding:

98. *Id.* at 474, 368 P.2d at 147.

99. 69 N.M. at 475, 368 P.2d at 148-49.

"The two primary limitations placed on the right of privacy are *publications of public records* and publications of matters of legitimate or public interest.

The publication of these pictures in these cases concerned matter of great public interest and was an official record made public by the Governor of South Carolina, and his highest law enforcement officials" (emphasis added). 176 F.Supp. at 674.

Similar to the above holdings, this Court has indicated that publications of matters of public record cannot violate state libel laws if true[100] and several recognized authorities have noted that such publications cannot invade a "privacy" which has been forfeited to the open scrutiny of the public record.[101]

It is important to further note with regard to the "public record" privilege, inasmuch as the publication in the case at bar relates to a matter contained in the public record of judicial proceedings (the victim's name having been stated in the indictments), that Georgia, in addition to at least twenty-two (22) other states and territories,[102] has established the privilege to publish a "fair and honest report of the proceedings of legislative or judicial bodies, or of court proceedings, or a truthful report of information received

100. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964)

101. Warren and Brandeis, *supra;* Prosser, *supra.*

102. ALA. CODE tit. 14, § 348 (1959); ARIZ. REV. STAT. ANN. § 13-356 (1956); CAL. PENAL CODE § 254 (West 1969); IDAHO CODE § 18-4807 (1948); KY. REV. STAT. ANN. § 411.060 (1963); LA. REV. STAT. ANN. § 14:49 (1951); MICH. STAT. ANN. § 27A.2911 (3) (1962); MINN. STAT. ANN. § 609.765 (4) (1971); MONT. REV. CODES ANN. § 94-2807 (1969); N. J. STAT. ANN. § 2A.43-1 (1952); N. M. STAT. ANN. § 40A-11-1 (F) (1974); N. Y. CIV. RIGHTS LAW § 74 (McKinney 1963); N. D. CENT. CODE § 12-28-10 (1960); OHIO REV. CODE ANN. § 2317.05 (Page 1954); OKLA. STAT. tit. 21, § 777 (1971); P. R. LAWS ANN. tit. 32, § 3144 (1968); TEX. REV. CIV. STAT. art. 5432 (1958); UTAH CODE ANN. § 76-40-6 (1953); V. I. CODE ANN. tit. 14, § 1183 (1964); WASH. REV. CODE ANN. § 9.58.050 (1956); WIS. STAT. ANN. § 895.05 (1965); WYO. STAT. ANN. § 1-876 (1959);

from any attesting officer or police authorities," GA. CODE ANN. § 105-704, 709(4), a privilege essentially predicated on the premise that such matters are of public record and consequently of public interest entitled to protected dissemination to the public. Establishment of the "public record" privilege herein advocated would be in furtherance of, and in complete harmony with, the rationale underlying such statutes.

By reason of the foregoing, appellants respectfully submit that it was error for the Georgia Supreme Court to have overlooked the fact that the name of the rape victim was a matter of public record (it being contained in the indictments) and to have failed to afford the appellants the privilege to truthfully and without actual malice, as appellants did, publish an account of a matter of public record.

3.

The First and Fourteenth Amendments Protect the Factual Publication of Truthful Information Which Is Published As Part of and Is Rationally Related to a Report Concerning a Matter of Public Interest.

Appellants respectfully submit that the privilege to publish matters of public interest protects the truthful publication of information arguably not a matter of public interest standing alone, but which is published as a part of and is rationally related to a report of a discussion concerning a subject matter of public interest.

Thus, the name of a murder-rape victim, when published, as in the instant case, in a truthful account of court proceedings and criminal prosecutions for a particular crime, is rationally related to a matter of public interest and is likewise constitutionally protected pursuant to the rule embodied within the clear rationale of this Court's

opinions in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); and *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court held a rule unconstitutional which compelled the critic of official conduct to guarantee the truth of all of his factual assertions upon pain of a libel judgment. The decision was predicated upon the Court's conviction that such a rule abridged the freedom of the press because of the self-censorship that would necessarily result.

In *Curtis Publishing Company, Inc.* v. *Butts*, 388 U.S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); and *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), this Court similarly rejected a rule that compelled the news media to guarantee the truth of all of its factual statements in reports relating to public figures and matters of public interest. The same principles would likewise appear to compel the rejection of a rule that the news media must guarantee that each separate fact published is a matter of "public interest" and newsworthy.

This Court has also made it abundantly clear that the protections of the First Amendment which in publication of matters of public interest shelter the *false fact* (which is not deliberately published) also protects the *relevant fact*[103] and the *rational interpretation* of the facts.[104] In *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971), this Court rejected the notion that a jury is free to impose civil liability upon one who publishes a fact which the jury does

103. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

104. *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971).

not feel "relevant" to discussion which is of public interest.

> "A standard of 'relevance' . . . especially such a trandard applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times, supra,* at 270 [11 L.Ed.2d at 701], which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail."[105]

In *Kois* v. *Wisconsin*[106] this Court held that nude photographs were constitutionally protected where their publication was *rationally related* to an article which was entitled to constitutional protection.[107] In *Kois*, this Court reiterated the language of *Thornhill* v. *Alabama*:[108]

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need *for information and education with respect to the significant issues of the time* (Court's emphasis)."[109]

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105. 401 U.S. at 276-277.
106. 408 U.S. 229 (1972).
107. 408 U.S. at 231.
108. 310 U.S. 88, 101-102 (1940).
109. 408 U.S. at 230.

In *Time, Inc.* v. *Pape*,[110] this Court held that a publication's choice of one of several "rational interpretations" was not sufficient to create a jury question on the issue of malice.[111]

Predicated on this same rationale, this Court has also stated and held in numerous decisions that the fact that an otherwise private person becomes an unwilling actor in an event of public interest in no way lessens the degree of public interest in the event and the individual's role in the newsworthy event. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 43 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).[112] Implicit in these decisions is the premise that the publication of facts, including the identity of the unwilling participants, rationally related to the subject matter of the report of public interest is constitutionally protected under the rulings of this Court following *N.Y. Times* v. *Sullivan*, 376 U.S. 254 (1964), and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).[113]

Such prior precedents of this Honorable Court appear to now require explicit articulation of the privilege for the publication of facts which are a part of and are rationally related to a report concerning a subject matter of public interest.

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110. 401 U.S. 279 (1971).

111. 401 U.S. at 290.

112. Numerous Circuit Court of Appeals have also recognized and applied this principle. *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 861 (5th Cir. 1970); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706, 710-11 (9th Cir. 1968).

113. A number of federal district courts have, in effect, applied a similar rationale keyed to the reasonableness of the relationship between the general subject matter and the reference or depiction of the plaintiff—denying relief where such a reasonable relationship is shown. *See Kent* v. *Pittsburgh Press Co.*, 349 F.Supp. 622, 627 (W.D. Pa. 1972); *Man* v. *Warner Bros., Inc.*, 317 F.Supp. 50, 52 (S.D. N.Y. 1970); *Goldman* v. *Time, Inc.*, 336 F.Supp. 133, 137-138 (N.D. Cal. 1971).

Under the allegedly erroneous "highly offensive" standard enunciated by the Supreme Court of Georgia in this case,[114] appellants are compelled to speculate at their peril whether or not a jury would ultimately decide that some facts in a story may not relate to a matter of public interest or might have been written with less harm to some particular plaintiff.[115] Such a situation would certainly have a "chilling effect" upon a publisher or broadcaster precipitating an extremely overly-cautious approach in the selection or editing of news stories which might possibly be said to offend *any* possible member of the audience.

The rule enunciated by the Supreme Court of Georgia, if permitted to stand, represents substantial incursion into the "breathing space"[116] which the First Amendment requires to survive. A publisher's efforts to ascertain that a report is true, fair, and impartial will not diminish his risk of civil damages for alleged invasions of privacy. The gist of the action is not inaccuracy of information, but rather a judgment that the defendant entered an area that a jury thinks he should not have entered in the way he did. A broadcaster cannot be sure of safety unless he resolves to stay out of *any* borderline area. Such a wariness could be seriously detrimental to the public's interest in the free flow of information and to the values embodied in the First Amendment guarantees of free speech and free press.

The defendants respectfully urge that this Court reassert the rule articulated in its prior holdings that "truth

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114. Appendix to Jurisdictional Statement, A-17.

115. Appendix to Jurisdictional Statement, A-17. The use of a "highly offensive" test is contrary to the rule laid down by this Court in *Winters* v. *New York*, 333 U.S. 507 (1948) that a publisher "cannot be required to guess."

116. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned,[117] and to explicitly recognize that the protection includes all facts rationally related to such a discussion.[118]

The decision of the Supreme Court of Georgia creates a cloud around the newsman who must have the freedom of expression necessary to inform the public of all facts relevant to newsworthy events.

The name of the murder-rape victim published here in connection with a timely report on the court proceedings and criminal prosecutions of the accused was a matter of public interest and rationally related to the newsworthy story of clear public interest as to be privileged under the First and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of Georgia to the contrary should be reversed.

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117. *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

118. *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971); *Time, Ins.* v. *Hill*, 385 U.S. 374 (1967); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971).

CONCLUSION

Appellants respectfully submit that the constitutional test of the First Amendment demands reversal of the decision of the Supreme Court of Georgia,[119] for publication of the name of the murder-rape victim should have been afforded constitutional protection as a matter of public interest[120] and as a fact rationally related[121] to the news story of the criminal prosecution of those who attacked her, such being clearly a newsworthy event and a matter of public interest.

The present decision of the Supreme Court of Georgia leaves doubt among the news media in Georgia and elsewhere as to the permissible parameters for publication under the First Amendment. Such ambiguity in news reporting is not in the public interest. The Georgia decision directly contravenes not only the express dictates of the First Amendment, but does violence to the precedents of this Court so construing the constitutional protection afforded under the First Amendment. Unless reversed, the decision of the Supreme Court of Georgia will impede the full and vigorous discussion and free and uninhibited debate[122] of matters of public interest which this Court has heretofore found to be protected under the First Amendment.

Instantaneous dissemination of news in today's world of global and satellite communication through electronic

119. Appendix to Jurisdictional Statement, A-9, 24.

120. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

121. *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

122. *Rosenbloom* v. *Metromedia, supra*: "Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' " *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 163-164, (1967) 403 U.S. at 92.

means now requires more than ever an explicit enunciation of the protection afforded the press in America to publish the news without being inhibited by the confusion created by state decisions like that of Georgia.[123] The right of the public to obtain all of the relevant news should not be impaired by uncertainties as to what may or may not be published which necessarily has been created by the complained of decision in the present case.

With all due respect, we respectfully submit that this Honorable Court should strike the Georgia statute[124] as an unconstitutional intrusion into the protection afforded by the First Amendment and, accordingly, reverse the judgment of the Supreme Court of Georgia. Such would serve to further delineate the guidelines for newsmen so as to assure that the public is fully informed of all matters of public interest or those rationally related. That newsmen should be so guided is in the public interest, as their role is one which serves always to inform the public. In the exercise of their First Amendment rights, newsmen must be permitted the broadest latitude in their reporting of the news and must be assured of freedom from harassment of lawsuits as, otherwise, they will "tend to become self-censors"[125] and, to that extent, free debate on public issues "will become less inhibited."[126] Such is not in the public interest.

For all the foregoing reasons, we respectfully submit that the decision of the Supreme Court of Georgia in the

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123. Appendix to Jurisdictional Statement, A-9, 24.

124. GA. CODE ANN. § 26-9901.

125. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

126. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

present case is clearly erroneous as a matter of law[127] and should be reversed with direction that summary judgment be entered in defendants' favor.

Respectfully submitted,

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127. In similar actions, summary judgment has been treated as the appropriate remedy. The courts consistently recognize the heavy burden imposed on one who seeks to overcome the constitutional privilege of the First Amendment. See *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971); *Treutler* v. *Meredith Corporation*, 455 F.2d 255 (8th Cir. 1972); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969). ". . . where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 864-865 (5th Cir. 1970).